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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

CLIFF THOMPSON,

Petitioner,

v.

VIRGIN RECORDS AMERICA, INC., SONY BMG MUSIC ENTERTAINMENT, ARISTA RECORDS, LLC, AND UMG RECORDINGS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prevailing defendant in a copyright infringement action should have a presumption of an entitlement to attorney's fees under 17 U.S.C. § 505 in order to be treated "evenhandedly" under *Fogerty v. Fantasy, Inc.*, as is the law of the Seventh Circuit, or should a prevailing defendant have to show "frivolousness" of the plaintiff's claim before recovering attorney's fees under the Fifth Circuit's application of *Fogerty*.

2. Whether a district court's consideration of the so-called "*Fogerty* factors" encourages defendants to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement, as required by this Court in *Fogerty v. Fantasy, Inc.*

3. Whether a district court's consideration of the "frivolousness" of the plaintiff's copyright claim when awarding attorney's fees under 17 U.S.C. § 505 is inherently unfair to prevailing defendants in copyright actions.

PARTIES TO THE PROCEEDING

Petitioner Cliff Thompson is an individual who resides within the Western District of Texas.

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OPINIONS BELOW

The January 4, 2008 opinion of the Fifth Circuit (App. at a1–a6) is reported at 512 F.3d 724. The November 29, 2006 order of the district court (App. at a7–a10), which dismissed the case and denied Petitioner's request for attorney's fees, is unreported.

BASIS FOR JURISDICTION

The order of the Fifth Circuit Court of Appeals was entered on January 4, 2008.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

This case involves the determination of when attorney's fees may be awarded to a prevailing party under 17 U.S.C. § 505, which states:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

STATEMENT OF THE CASE

The district court in this case properly had jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338(a) (copyright).

This is a case about peer-to-peer file sharing. Specifically, this case is about the ability of an innocent defendant accused of copyright infringement to defend himself in court, litigate his defenses, and, if successful, recover his attorney's fees to the same extent as a prevailing plaintiff would under the same circumstances. The implications of this case extend to tens of thousands of innocent defendants across the country who have been sued for copyright infringement simply because they happen to pay for an internet service account that was used by someone else to download music.

This Court has already addressed at least one monumental case concerning this subject matter in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764 (2005), which held that a distributor of peer-to-peer file-sharing software could be secondarily liable for copyright infringement by users of its program. This case is equally important in that the Court will determine the *de facto* ability of innocent defendants accused of such file-sharing to fully litigate their defenses against claims for copyright infringement, in accordance with the already-recognized policies of the Copyright Act.

The problem stems from this Court's "sanctioning" in *Fogerty v. Fantasy, Inc.*, 510 U.S.

517, 114 S.Ct. 1023 (1994), and district courts' almost universal use, of four specific factors—frivolousness, motivation, objective unreasonableness of the parties' arguments, and the need to advance the policies of the Copyright Act—that may be considered by courts so long as both prevailing plaintiffs and prevailing defendants are treated "evenhandedly." *Fogerty*, 114 S.Ct. at 1034. That such treatment with regard to attorney's fees can be "evenhanded" presupposes, however, that consideration of these factors can be reduced by a trial court to a simple calculus that treats prevailing plaintiffs and prevailing defendants the same, when such is not the case. Rather, consideration of the *Fogerty* factors is biased against prevailing defendants.

For example, for a plaintiff to prevail in a copyright infringement case, the plaintiff must prove the case by a preponderance of the evidence. Attorney's fees then are normally awarded to the prevailing plaintiff, whose case was not frivolous because the plaintiff won. Normally there is no mention of "frivolousness" in awarding attorney's fees to the prevailing plaintiff.

On the other hand, if a defendant in a copyright infringement case prevails under the "preponderance of the evidence" standard, the prevailing defendant must also show the plaintiff brought a "frivolous" copyright infringement case before the prevailing defendant will be awarded attorney's fees. Because of this additional burden of proving "frivolousness," prevailing defendants in copyright cases almost never recover their attorney's fees, especially in the Fifth Circuit.

The inherent unfairness to prevailing defendants of using these factors manifests itself in the current onslaught of litigation by the music industry against alleged infringers of the industry's copyrights. Since 2003, the Recording Industry Association of America (RIAA) and its members have instigated a massive litigation campaign targeted at end users of peer-to-peer file sharing programs like Napster, Grokster, and Kazaa. The strategy is this: (1) file a lawsuit against a "John Doe" tied to an internet protocol (IP) address that has been used to download music; (2) subpoena records from the internet service provider demanding the name and physical address of the person who pays for the internet service account linked to the IP address; then, (3) sue the subscriber of the internet service account for copyright infringement.[1]

As of October 2007, the recording industry had filed roughly 26,000 lawsuits alleging copyright infringement through illegal downloading. App. at a14. The vast majority of these lawsuits are filed without the plaintiffs having any evidence of who has illegally downloaded copyrighted material. The RIAA, or some other plaintiff, simply files a lawsuit against the subscriber of an internet service account and forces that subscriber to decide between defending himself in a costly lawsuit or settling out of court. Although the account subscriber is often not the person doing the downloading, it is the

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[1] Ray Beckerman, *How the RIAA Litigation Process Works*, *available at* http://info.riaalawsuits.us/howriaa_printable.htm (last visited Mar. 12, 2008).

subscriber that gets haled into court and forced to settle or otherwise deal with the case.

Interestingly, it is no secret to the recording industry, or anyone else for that matter, that the ultimate downloader is often not the internet account subscriber. Often, it is the adolescent children of the subscriber. App. at a17. It may, however, be an infringer that uses an internet account of his roommate. App. at a20. It may be a grandchild who downloads music over an internet account of her grandfather. App. at a20. Or it may be a person who downloads music over the unsecured wireless network of his neighbor.

Cary Sherman, President of the RIAA, stated that he expects to hear from the defendants in these cases that it is their children downloading the music. App. at a18. But the children usually do not have any money to pay damages for infringement. The music companies, quite obviously, are banking that the parents will fork over a relatively small settlement to bail their kids out of trouble rather than risk incurring costly litigation expenses and attorney's fees. App. at a18.

Clearly, the industry has gambled that defendants will make the financially-rational decision of settling the lawsuits—regardless of culpability—rather than risk financial ruin in a knock-down, drag-out legal fight. More often than not this strategy works, as the vast majority of these defendants never see the inside of a courtroom in these lawsuits, simply because even if the innocent defendant were to win his case on the merits, he more than likely would lose in his pocket book. Why

spend $25,000, $50,000, or $100,000 in attorney's fees to fight a case that can be settled for $5000? In fact, for many of the innocent defendants, litigation is not even a viable option due to their financial condition. And, despite § 505, defendants in these circumstances are not going to recover attorney's fees for their troubles.

But what happens when an accused infringer refuses to settle for something he did not do? Consider, for example, the case of Petitioner Cliff Thompson.

In October 2004, armed with nothing more than a six-page list of IP addresses, fifteen recording companies filed a lawsuit claiming copyright infringement of various songs by 151 unknown persons. The United States District Court for the Western District of Texas issued a subpoena to Southwestern Bell Internet Services (SBIS), the internet service provider that allocated the IP addresses, commanding SBIS to produce "[i]nformation, including name, address, telephone number, [and] e-mail address . . . sufficient to identify the alleged infringers of copyrighted sound recordings." One of those IP addresses was traced to an account paid for by Thompson.

After SBIS identified Thompson as one of the subscribers, Respondents (collectively, "Virgin") sued Thompson for copyright infringement. In his answer, Thompson denied ever downloading the identified songs and denied committing any acts of infringement. In fact, Thompson suggested—prior to any formal discovery requests—that if anyone

downloaded the songs in question, it probably would have been his adult daughter.

Thompson also counterclaimed, asking the district court for a declaratory judgment of non-infringement. The district court, however, dismissed Thompson's counterclaim as "redundant and unnecessary." App. at a11. Despite Thompson's insistence that his counterclaim be allowed in order that he recover his attorney's fees, the court stated that "[n]o distinction is made in the Copyright Act between prevailing plaintiffs and prevailing defendants. The Court is unaware of any rule whereby a prevailing defendant must have an outstanding claim for declaratory relief to be eligible for attorney's fees." App. at a11–a12 (citation omitted).

Eventually convinced of Thompson's innocence, mostly due to the legwork done by Thompson himself, Virgin moved to dismiss the action with prejudice and for each party to bear its own costs. Having already spent roughly $7500 to defend himself, Thompson responded with a request for attorney's fees as a prevailing party under § 505 of the Copyright Act, which Virgin contested.

The court dismissed the case with prejudice and ordered the parties to bear their own costs. In its order denying Thompson his attorney's fees, the district court "applied" the *Fogerty* factors and found "that this suit was not *frivolous* or objectively unreasonable and that plaintiffs' motivation in bringing the suit was proper. . . . The Court is not persuaded that plaintiffs have acted in bad faith or maliciously . . . ." App. at a9 (emphasis added).

The district court's denial of Thompson's request hinged largely on his purported lack of responsiveness to the plaintiffs' pre-suit communications, but the extent of contact between Thompson and the plaintiffs prior to the lawsuit is disputed. In its appeal brief, Virgin provided a timeline of its "efforts to discuss" the alleged infringement with Thompson. Thompson, on the other hand, disputes that he received the number of messages that Virgin claims was left. App. a9–a10.

Thompson appealed the denial of attorney's fees to the Court of Appeals for the Fifth Circuit without success. The Fifth Circuit saw no abuse of discretion in the district court's denial under *Fogerty*. The district court, said the Fifth Circuit, "applied [the *Fogerty*] factors to the facts of this case and determined that they weighed against awarding attorney's fees." App. at a5.

The problem, however, is that these factors simply cannot be applied in an "evenhanded manner" to both prevailing plaintiffs and prevailing defendants as required by *Fogerty*. For example, to recover attorney's fees, district courts require a prevailing defendant to show the frivolousness of the plaintiff's claim, but never require a prevailing plaintiff to show frivolousness of the defendant's counterclaim. And not surprisingly, as a result of this unfairness, prevailing defendants are almost never awarded their attorney's fees.

REASONS FOR GRANTING WRIT

1. Background.

In *Fogerty*, this Court unified a long-standing split in the courts of appeals concerning the award of attorney's fees to the prevailing party in copyright infringement cases. Until *Fogerty*, the Ninth Circuit applied the "dual standard," under which prevailing defendants had to show that the original suit was frivolous or brought in bad faith in order to be awarded their attorney's fees. Other circuits used the "evenhanded" approach, in which "no distinction is made between prevailing plaintiffs and prevailing defendants." *Fogerty*, 114 S.Ct. at 1027. The dual standard approach placed a higher burden on prevailing defendants to be awarded attorney's fees than prevailing plaintiffs, while the "evenhanded approach" used by the Third Circuit and other circuits did not require a plaintiff's bad faith in bringing the suit. *Id.* at 1026–27.

The *Fogerty* opinion decreed that "[p]revailing plaintiffs and prevailing defendants are to be treated alike . . . . There is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised." *Fogerty*, 114 S.Ct. at 1033 (internal quotation marks omitted). The *Fogerty* opinion noted that "defendants who seek to advance a variety of meritorious copyright defenses should be *encouraged to litigate them* to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 1030 (emphasis added). Such full and fair litigation benefits the public generally by demarcating the scope of available copyright protection, and "a

successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright." *Id.*

But rather than focusing on the tenor of *Fogerty*—that is, treating prevailing plaintiffs and prevailing defendants equally with regard to awarding attorney's fees—district courts have latched on to one footnote of *Fogerty* and almost uniformly used four specific factors—frivolousness, motivation, objective unreasonableness, and the need to advance considerations of compensation and deterrence—to determine whether an award of attorney's fees to a prevailing party is proper, especially for an award to a prevailing defendant. *Fogerty*, 114 S.Ct. at 1033 n.19. Almost uniformly since *Fogerty*, a district court's order in a copyright case addresses each of these four factors when justifying the denial of fees under § 505 to a prevailing defendant. For example, the trial court in Petitioner's case spent one full paragraph addressing the frivolousness and motivation of the plaintiffs, noting that "[t]here is no indication in the record that plaintiffs filed this suit frivolously or prosecuted this suit with malevolent intent." App. at a8. The court continued, "Plaintiffs brought an objectively reasonable[2] suit to protect their copyrights. The

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[2] Interestingly, this quote from the district court underscores the lack of clarity surrounding use of the *Fogerty* factors. The question asked by other courts is not whether *the suit* is objectively unreasonable (which seems to be the same question as to the frivolousness of the underlying claim), but whether the losing party's *legal or factual argument was objectively unreasonable*. *See., e.g., Margo v. Wiess*, 213 F.3d 55 (2d Cir. 2000) (indicating that the songwriters' counsel was objectively

Court is not persuaded that plaintiffs have acted in bad faith or maliciously so that they should be deterred from the same conduct in the future." App. at a9.

At first glance, the plaintiffs' strategy in this case hardly seems different from any other settlement negotiation—that is, tell the defendant to either settle out of court or defend himself in court. But when considered in light of the substance of and policies behind copyright law as articulated by this Court, the problem in the present case—and with the tens of thousands of similar cases across the country—becomes evident.

2. **Application of the *Fogerty* factors cannot be "evenhanded" as required by this Court because the factors are inherently unfair to prevailing defendants vis-à-vis prevailing plaintiffs.**

If a trial court elects to consider the *Fogerty* factors—and it will, most likely, at least give them lip service—precisely *how* is the trial court to consider them in an "evenhanded manner" with regard to both a prevailing defendant as well as a prevailing plaintiff? *Fogerty* is silent on this

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unreasonable in filing affidavits, delaying deposition errata sheets, and delaying answers to interrogatories that showed their case was time-barred); *Budget Cinema, Inc. v. Watertower Assocs.*, 81 F.3d 729 (7th Cir. 1996) (noting that a case was objectively unreasonable because the plaintiff filed its copyright registration and its complaint without having any ownership interest in the underlying work). In the present case, the district court simply used "not frivolous" and "not objectively unreasonable" to mean the same thing. App. at a9.

question. Intuitively, it seems impossible to pick these four factors and arrive at some evenhanded, balanced equation that satisfies the tenor of *Fogerty* in that regard.

Consider, once again, the first three *Fogerty* factors when applied by a trial court in a typical peer-to-peer music downloading case:

> (1) Frivolousness is only a function of the plaintiff's behavior. If the plaintiff is the prevailing party, his claim is inherently not frivolous, and there is nothing to consider so far as the defendant's behavior is concerned. One might argue that a defendant's "frivolousness" could be considered in light of any asserted counterclaims, such as a declaratory judgment action, but all too often—as was the case with Thompson—such a counterclaim is dismissed by the trial court as "redundant."
>
> (2) If the plaintiff prevails, the motivation behind the defendant's infringement—i.e., whether the infringement was either willful or innocent—is considered. If an innocent defendant is the prevailing party, only the plaintiff's motivation during litigation is considered—that is, whether the litigation was conducted in good faith.
>
> (3) Whether the losing party's position is objectively unreasonable depends on the facts and legal arguments made during proceedings. In cases like Thompson's, the lawsuit does not progress far enough for the

> reasonableness of the *defendant's* position to be considered unless the defendant refuses the music companies' initial settlement offer and takes the risk of requiring them to prove their case. If the innocent defendant simply requires the plaintiff to meet its burden of proof, as soon as the facts start to swing against the plaintiff, the plaintiff simply dismisses the case, and its position will never seem objectively unreasonable. Meanwhile, the innocent defendant has spent a significant amount of money in legal fees.

Simply put, it is impossible for a court to apply the factors mentioned in *Fogerty* to prevailing plaintiffs and prevailing defendants in an evenhanded manner. For example, the trial court's opinion gave no consideration to the merits of Thompson's defense, but essentially concluded, contrary to the tenor of *Fogerty*, that because the plaintiffs' cause was not "frivolous," no attorney's fees should be awarded to Thompson.

Does this logic not directly conflict with this Court's proclamation in *Fogerty* that an innocent defendant should be encouraged to litigate his meritorious defenses? Why does the purported "non-frivolousness" of Virgin's behavior in this case trump the consideration that Thompson be encouraged to litigate his innocence and not simply settle due to financial considerations? These are questions *Fogerty* fails to address.

3. **A prevailing party should receive a presumption of entitlement to an award of attorney's fees, as is the rule in the Seventh Circuit.**

Unlike the other circuits, the Seventh Circuit has recognized the flawed nature of using the *Fogerty* factors since at least 2002. Calling the *Fogerty* factors "miscellaneous" and "ill-assorted," Judge Posner noted that this Court "[left] the decision on whether to grant or deny attorneys' fees to the prevailing party in a copyright case pretty much to the discretion of the district judge." *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 609 (7th Cir. 2002).

But unsatisfied with so much judicial discretion, the Seventh Circuit instituted a presumption that the prevailing party in a copyright lawsuit is entitled to an award of attorney's fees. *Gonzales*, 301 F.3d at 610. "[W]hen a meritorious [copyright infringement] claim or defense is not lucrative, an award of attorneys' fees may be necessary to enable a party possessing the meritorious claim or defense to press it to a successful conclusion rather than surrender it because the cost of vindication exceeds the private benefit to party." *Assessment Techs. of WI, L.L.C. v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004). This rationale is entirely consistent with this Court's view on the policies of the Copyright Act.

Importantly, the Seventh Circuit took this presumption a step further in the case of a prevailing defendant: "When the prevailing party is the defendant, who by definition receives not a small

award but no award, the presumption in favor of awarding fees is *very strong*. For without the prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights." *Assessment Techs.*, 361 F.3d at 437 (emphasis added) (citation omitted); *see also Woodhaven Homes & Realty, Inc. v. Hotz.*, 396 F.3d 822, 824 (7th Cir. 2005) (noting that *Assessment Technologies* clarified the *Fogerty* standard, and "that prevailing defendants in copyright cases . . . are presumptively entitled (and strongly so) to recover attorney's fees").

In *Riviera Distributors, Inc. v. Jones*, --- F.3d ---, 2008 WL 441762 (7th Cir. 2008), the Seventh Circuit reversed the district court's denial of attorney's fees to a prevailing copyright defendant when the district court justified the denial by "reject[ing] the suggestion that the [unsuccessful plaintiff's] pursuit of th[e] action was frivolous, baseless, or objectively unreasonable." *Riviera Distributors*, 2008 WL 441762, at *2 (quoting the district court). That, said the court, is not the test: "*Fogerty* rejects such an asymmetric approach for § 505." *Id.*

Clearly the Seventh Circuit understands what *Fogerty* did and did not do, and has elected to fill in the gaps in order to satisfy the tenor of *Fogerty*. Petitioner asks this Court, *inter alia*, to follow the Seventh Circuit in requiring that a prevailing party in a copyright infringement action, whether plaintiff or defendant, be presumptively entitled to a recovery of attorney's fees. Only with such a presumption can a prevailing defendant be treated in an evenhanded manner as set forth by this Court in *Fogerty*.

Moreover, because the Seventh Circuit's approach is a presumption, the approach is also entirely consistent with *Fogerty*'s rejection of the British rule for awarding attorney's fees. *See Fogerty*, 114 S.Ct. at 1033.

4. Empirical Data Showing Inherent Unfairness.

If prevailing plaintiffs and prevailing defendants in copyright actions are, contrary to Petitioner's contentions, being treated in an evenhanded manner, one would expect statistics to bear that out. But a close inspection of copyright cases within the Fifth Circuit reveals a significant disparity between the number of awards of attorney's fees to prevailing plaintiffs versus prevailing defendants.

In Fifth Circuit copyright cases since *Fogerty*, for example, prevailing plaintiffs are awarded their attorney's fees with far more frequency than prevailing defendants. In music and movie infringement cases within the Fifth Circuit,[3] prevailing plaintiffs were awarded attorney's fees thirteen out of fourteen times (93%)[4] compared with

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[3] Petitioner searched the Westlaw® database for music and movie cases within the Fifth Circuit.

[4] Attorney's fees were awarded to prevailing plaintiffs in the following cases: *Alameda Films SA de CV v. Authors Rights Restoration Corp.*, 331 F.3d 472 (5th Cir. 2003) (affirming an award of attorney's fees to the prevailing plaintiffs, but remanding the case for a more definite determination as to the amount); *Lewis v. Ichiban Records, Inc.*, No. 96–30244, 1996 WL 767441 (5th Cir. Dec. 23, 1996) (per curiam) (affirming attorney's fees award where plaintiff prevailed on its copyright infringement claims for six out of eight songs); *Controversy*

no awards of a prevailing defendant's attorney's fees in five out of five cases.[5] And this is in a circuit

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Music v. Down Under Pub Tyler, Inc., 488 F. Supp. 2d 572 (E.D. Tex. 2007); *EMI April Music Inc. v. Know Group, LLC*, No. 3:05-CV-1870-M, 2006 WL 3203276 (N.D. Tex. Nov. 6, 2006); *WB Music Corp. v. Big Daddy's Entm't, Inc.*, No. EP-05-CA-267-PRM, 2005 WL 2662553 (W.D. Tex. Oct. 18, 2005); *Capitol Records, Inc. v. Lyons*, No. Civ.A.3:03-CV-2018-L, 2004 WL 1732324 (N.D. Tex. Aug. 2, 2004); *Arista Records, Inc. v. Kabani*, No. Civ. 303CV1191-H, 2004 WL 884445 (N.D. Tex. Apr. 23, 2004); *Broadcast Music, Inc. v. Barflies, Inc.*, No. Civ.A 03-304, 2003 WL 21674470 (E.D. La. July 16, 2003); *Malaco Inc. v. Cooper*, No. CIV.A. 300CV2648P, 2002 WL 1461927 (N.D. Tex. July 3, 2002); *Johnson v. Tuff-N-Rumble Mgmt., Inc.*, No. Civ.A. 99-1374, 2000 WL 1808431 (E.D. La. Dec. 11, 2000); *New Perspective Publ'g Inc. v. Silverine Simon*, No. 94cv366, 1994 WL 776088 (E.D. Tex. Nov. 17, 1994); *Jobete Music Co. v. Hampton*, 864 F. Supp. 7 (S.D. Miss. 1994); *Sailor Music v. Davis*, Civ. A. No. 4:94-CV-112-Y, 1994 WL 736412 (N.D. Tex. Sept. 30, 1994). The only case in the Fifth Circuit in which attorney's fees were not awarded to prevailing plaintiffs is *Granville v. Suckafree Records, Inc.*, No. Civ.A. H-03-3002, 2006 WL 2520909 (S.D. Tex. June 28, 2006). In *Granville*, the district court denied attorney's fees because prevailing plaintiffs only "prevailed" on a single infringement claim out of four asserted and because the plaintiffs had a high level of objective unreasonableness and frivolous filings. In one other music case from the Fifth Circuit, *Atlantic Recording Corp. v. Falgout*, Civil Action No. 06-3784, 2007 WL 4163430 (E.D. La. Nov. 21, 2007), the court did not undergo a *Fogerty* analysis, but instead denied the prevailing plaintiffs' request for attorney's fees because the plaintiffs failed to raise the point in their motion for summary judgment. As such, this case is not reflected in Petitioner's statistics.

[5] *See Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 380 (5th Cir. 2004) (affirming the district court's denial of attorney's fees to a prevailing defendant with an extensive discussion of *Fogerty*); *Johnson v. Tuff-N-Rumble Mgmt., Inc.*, No. CIV.A.99-1374, 2000 WL 1145748 (E.D. La. Aug. 14, 2000); *McKinley v. Raye*, No. Civ.A.3:96-CV-2231-P,

where attorney's fees are "awarded routinely"! *See Positive Black Talk Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 380 (5th Cir. 2004).

5. *Fogerty*'s Practical Effect on Music Downloading Cases.

The approach adopted by the district courts—that is, applying the *Fogerty* factors under the auspices of "evenhandedness"—has a very real effect. Not only are innocent defendants discouraged from asserting their meritorious defenses against claims of infringement, but a different sort of cost-shifting occurs as the cost of discovery is shifted from the music company plaintiffs to the innocent defendants.

When all that is required of a copyright holder to overcome any hint of frivolousness is a subpoena requiring documents linking an IP address to a specific account holder, the ultimate burden of discovering the proper, culpable defendant shifts from the plaintiff to the innocent defendant. If the innocent defendant is not prepared to offer up the infringer hoping that the plaintiff, in return, will dismiss its case, the only other choices are to settle a claim for something that he did not do, or assert his defense at great cost with little chance of the court shifting attorney's fees in his favor under § 505 of the Copyright Act.

1998 WL 119540 (N.D. Tex. Mar. 10, 1998); *Hodges v. Jackson*, No. CIVASA97CA0266, 1997 WL 33139040 (W.D. Tex. Dec. 24, 1997); *Makedwde v. Johnson*, Civ. A. No. 91-879, 1994 WL 97781 (E.D. La. Mar. 23, 1994).

CONCLUSION

If the music companies choose to take the risk of suing an innocent party in exchange for the expediency of minimizing their pre-suit investigations as to who is actually file-sharing music, it is not the innocent defendant that should suffer when he is ultimately a prevailing party in the litigation. Petitioner does not suggest that the music companies should not be able to pursue their causes of action for copyright infringement unless they first identify the correct infringer. Nor does Petitioner suggest that suing the subscriber of an internet service provider without any evidence supporting a claim for infringement should be disallowed or considered frivolous. Petitioner does, however, suggest that the Court's decision in *Fogerty* should be clarified or refined so that district courts truly treat prevailing plaintiffs and prevailing defendants in an evenhanded manner and allow prevailing defendants an equal right to recover their fees for litigating their meritorious defenses.

Should copyright owners be encouraged to fully and fairly litigate their infringement claims? Absolutely. But so should accused infringers be encouraged to fully and fairly litigate their meritorious defenses. *Fogerty*, as interpreted by the circuits other than the Seventh Circuit, simply does not provide that incentive:

> The mechanical application of the [*Fogerty*] factors to determine whether section 505 should be invoked is not a faithful application of *Fogerty*. To do this is to miss the forest for the trees.

> *Fogerty* must be read at a higher level of generality. Otherwise achieving its goal of even-handed treatment is virtually impossible.[6]

There is a clear and present need for this Court's intervention and guidance on this important issue of copyright law. Moreover, an absence of uniformity between the circuits, concurrent with an onslaught of litigation by the music companies against internet account holders, only serves to provide innocent defendants with even little, if any, incentive to fully litigate any meritorious defenses they may have, contrary to the policies this Court has recognized. Despite the district courts' lip service to *Fogerty*'s factors, the reality is that prevailing plaintiffs and prevailing defendants are not being, and cannot be, treated in an evenhanded manner as required by this Court.

Cliff Thompson respectfully submits that these considerations justify the Court's granting of this Petition for Writ of Certiorari.

Respectfully submitted,

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[6] Douglas Y'Barbo, *The Effect of* Fogerty v. Fantasy *on the Award of Attorney's Fees in Copyright Disputes*, 5 TEX. INTELL. PROP. L.J. 231, 237 (Winter 1997).